

**NOT FINAL UNTIL TIME EXPIRES FOR REHEARING,
AND IF FILED, DETERMINED**

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

BRIAN MYRBACK and LORI
MYRBACK, as Trustees of THE
MYRBACK FAMILY REVOCABLE
TRUST DATED OCTOBER 15, 2015,

Petitioners,

v.

Case No.: 21-000014-AP-88B
Lower Tribunal No: VAR-21-15

JAMES P. DONOVAN and
PINELLAS COUNTY, a political
Subdivision of the State of Florida,

Respondents.

_____ /

Opinion filed: _____

Petition for Writ of Certiorari from
Approval of Variance by
Pinellas County Board of
Adjustment and Appeals

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PER CURIAM

Petitioners, BRIAN MYRBACK and LORI MYRBACK (“Petitioners”) seek certiorari review of Respondent, PINELLAS COUNTY’s decision through the Pinellas County Board of Adjustment and Appeals (“the Board”) to grant a variance to Respondent, JAMES P. DONOVAN (“Respondent”) for the construction of a new boat lift. For the reasons set forth below, the Second Amended Petition for Writ of Certiorari (“the Petition”) dated September 23, 2021 is hereby **GRANTED.**

Factual and Procedural History

Respondent purchased the property immediately north of Petitioners’ residence in 2020. Respondent and Petitioners’ adjacent waterfront residential properties are located in unincorporated Palm Harbor. Respondent’s property includes a dock and boat lift which were constructed by a prior owner around 2001. Respondent’s existing boat lift is located on the south side of Respondent’s dock -

the side closest to Petitioners' property.¹ The existing structures do not comply with the Pinellas County Land Development Code ("LDC"). However, these structures received permitting approval from Respondent, PINELLAS COUNTY ("the County") after the prior owners of Respondent's property obtained a signed statement of no objection from the prior owner of Petitioners' property.

Respondent seeks to demolish his existing dock and boat lift and build new structures which are similar to the existing construction but with some modifications. A provision of the LDC allows for the reconstruction of previously permitted structures. Much of Respondent's plans fall within this reconstruction provision. However, the portions of Respondent's plans which call for the shifting of the new boat lift six feet west of its current location and for the extension of the current dock by approximately eight feet fall outside the reconstruction provision and also do not comply with the LDC. As such, Respondent was either required to obtain signed statements of no objection from his neighbors or obtain variances

¹ The existing "boat lift" is technically a PWC (i.e. a jet ski) lift. Respondent's construction plans call for a boat lift instead of a PWC lift. We elect to use only the term "boat lift" to refer to both the existing PWC lift and the proposed new boat lift as the distinction between the two is not important to the substance of this action.

from the Board for these modifications. Petitioners refused to sign a statement of no objection. Accordingly, Respondent had to seek variances from the County to proceed with his plans.

Section 58-555(b)(2) of the LDC provides that “[p]rivate docks and **boat lifts**, excluding tie poles, **must be constructed within the center one-third of the applicant's waterfront property** or 50 feet from the adjacent property, whichever is less restrictive.” (Emphasis added). Respondent’s waterfront property width is 85.4 feet, and thus Section 58-555(b)(2) would ordinarily require Respondent’s dock and boat lift to be set back at least 28.4 feet from Petitioners’ property boundary. However, Respondent’s proposed new boat lift has a setback of only 4.7 feet from Petitioners’ northern property boundary.² Accordingly, Respondent needs a variance from the County to construct the boat lift as planned.

LDC Section 138-235(a) defines a variance “as a request to lessen or remove certain dimensional standards of the [LDC] for a particular property or structure.” Pursuant to LDC Section 58-539(a),

² Respondent’s existing boat lift currently has the same or similar set back from Petitioners’ northern property boundary. However, it was a prior owner of Petitioners’ property, not Petitioners, who provided a signature of no objection for the construction permits which allowed for the current placement of the boat lift.

the Board may review and decide whether to grant variances for applications involving LDC Section 58-555(b)(2). LDC Section 138-231 states: “In order to authorize **any** variance, waiver, and/or administrative adjustment to the terms of the Code, the authorized reviewing body **shall determine the following criteria have been satisfied.**” (Emphasis added). The code then lists eight criteria, all of which must be satisfied in order for a variance to be granted.

In November 2020, Respondent submitted his variance application. As part of the variance process, the Pinellas County Water and Navigation Division (“the WND”) conducted an inspection of Respondent’s property and issued a report analyzing whether the variance application satisfied the criteria of LDC Section 138-231. The WND’s report recommended approval of the dock length variance and denial of the boat lift variance. The WND opined that four LDC Section 138-231 elements were not met by the boat lift application, only two of which are at issue in this action: 1) special conditions; and 2) unnecessary hardship. The WND further opined that the boat lift could be constructed on the north side of the dock without a variance as it would then be located in the center one-third of Respondent’s property in compliance with LDC Section 58-555(b)(2).

On May 5, 2021, the Board conducted a quasi-judicial public hearing on Respondent's requested variances pursuant to LDC Section 138-235(a). Respondent was represented by counsel and presented the testimony of an expert, Terri Skapik of Woods Consulting. Petitioner, James Myrback appeared pro se. The County appeared through counsel and another representative who presented the findings of the WND.

After hearing argument and receiving evidence, the Board ultimately found that the evidence presented by Respondent satisfied the criteria of LDC Section 138-231. The Board unanimously granted both the dock length and the boat lift variances. This decision was reduced to a written order dated May 5, 2021 ("the Variance Order").³ Petitioners subsequently filed a timely petition for writ of certiorari contesting only the boat lift variance granted by the Board. The dock length variance is not at issue in this action.

³ The Board's Variance Order dated May 5, 2021 merely states as to the boat lift variance: "Please be advised that by action of the Pinellas County Board of Adjustment and Appeals on May 5, 2021...your requested variance to allow for the construction of a private residential boat lift with a 4.7 foot setback from the south property line was conditionally approved based on the Board's determination that the request meets the criteria for granting variances found in Section 138-231 of the Pinellas County Land Development Code and Section 58-539 of the Pinellas County Code." There is no written analysis of the LDC Section 138-231 elements in the Variance Order.

Standard of Review

This Court has jurisdiction to review this matter pursuant to Rule 9.030(c)(3) of the Florida Rules of Appellate Procedure. When reviewing administrative action pursuant to its certiorari jurisdiction, “the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence.” *Evergreen Tree Treasurers of Charlotte Cty., Inc. v. Charlotte Cty. Bd. of Cty. Com'rs*, 810 So. 2d 526, 529 (Fla. 2d DCA 2002) (citing to *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)).

A circuit court’s review of an agency decision for competent substantial evidence is limited to determining whether the evidence before the agency was legally sufficient to support the agency’s decision. *Sch. Bd. of Hillsborough Cty. v. Tenney*, 210 So. 3d 130, 134 (Fla. 2d DCA 2016) (citing to *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000)). A circuit court reviewing administrative action pursuant to its certiorari jurisdiction is not permitted to reweigh the evidence or substitute its judgment for that of the agency. *Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning*

Bd. of Appeals, 541 So. 2d 106, 108 (Fla. 1989) (citing to *Bell v. City of Sarasota*, 371 So. 2d 525, 527 (Fla. 2d DCA 1979)).

Evidence contrary to the agency's decision is outside the scope of the inquiry, for the reviewing court above all cannot reweigh the "pros and cons" of conflicting evidence. *Dusseau v. Metro. Dade Cty. Bd. of Cty. Com'rs*, 794 So. 2d 1270, 1276 (Fla. 2001). Evidence that is confirmed untruthful or nonexistent is not competent, substantial evidence. *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017). Competent, substantial evidence must be reasonable and logical. *Id.* (citing to *Gonci v. Panelfab Prods., Inc.*, 179 So. 2d 856, 858 (Fla. 1965)).

Analysis

Petitioners do not dispute the adequacy of procedural due process in the underlying proceeding before the Board. Although Petitioners argue that the Board departed from the essential requirements of the law, Petitioners do not dispute that the Board applied the correct law, Section 138-231 of the LDC, when considering the disputed variance. Instead, Petitioners argue that the Board improperly applied Section 138-231 to the facts of this case. This does not provide the basis for a finding of a departure from the

essential requirements of the law. *See e.g. Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) (stating that “‘applied the correct law’ is synonymous with observing the essential requirements of law”).

The instant Petition asks this Court to consider whether competent substantial evidence supported the Board’s conclusion that special conditions and an unnecessary hardship existed within the meaning of LDC Section 138-231 as to Respondent’s boat lift variance. We need not analyze the special conditions element as we conclude that the record below does not contain competent substantial evidence of an unnecessary hardship.

In order to demonstrate an unnecessary hardship, Section 138-231 of the LDC requires the Board to consider whether “literal interpretation of the provisions of [the] Code would deprive or make it practically difficult for the applicant to achieve the same proportion of development potential commonly enjoyed by other properties in the same zoning district under the terms of this chapter.” Stated more specifically, the issue before the Board was whether requiring Respondent’s new boat lift to be constructed in the center 1/3 of his property would deprive him of a boat lift or make it practically

difficult for him to build a boat lift similar to those commonly enjoyed by other properties in the same zoning district.

First we must consider whether there is any record evidence that strict enforcement of LDC Section 58-555(b)(2) would altogether deprive Respondent of a boat lift. Absent from the record is any argument or evidence that such a total deprivation would occur. At the hearing on May 5, 2021, counsel for the County stated the following:

As far as the undue hardship piece is concerned, Staff isn't telling the applicant that he can't have a lift. Again, you know, I think the argument might be a little bit stronger if we -- if he was being told that he can't have a lift... ***but the applicant here has two avenues to enjoy a boat lift: He can leave the lift where it currently is or he can even move it to the north side.***

Am. App.⁴ 106: 16-25. (Emphasis added). The WND's report, which was presented to the Board at the May 5, 2021 hearing, also concluded that "the applicant can still enjoy a boat lift on the north side of the Dock." Am App. 009. Respondent did not dispute this suggestion at any time during the May 5, 2021 hearing. Thus, the

⁴ "Am. App." refers to the Amended Appendix filed by Petitioners on September 23, 2021 in conjunction with their Motion for Leave to File Second Amended Petition for Writ of Certiorari.

record altogether lacks evidence that Respondent would suffer a complete deprivation of a boat lift due to a strict application of LDC Section 58-555(b)(2).

We now consider the sufficiency of the evidence for the alternative scenario: whether requiring Respondent's design plans to strictly comply with LDC Section 58-555(b)(2) would make it *practically difficult* for Respondent to construct a boat lift. After hearing argument and receiving evidence from the parties, Board member John Doran stated the following on the record at the May 5, 2021 hearing:

When the time comes, if I need to, I'll make that motion to approve what the Staff has recommended for all the right reasons, including the fact that there are special conditions and there is an **undue hardship** with respect to the boat lift.

...

Based on the evidence that I've heard and seen, I think I'm persuaded that there are, in fact, special conditions that would support the proposal to push the boat lift further out and make it narrower. And then the -- but in the -- basically the same footprint. I am persuaded that there is evidence that the **depths of the water** would support that as a proposition. I'm also persuaded that we can pretty much conclude with some certainty that leaving it

where it is won't impact the **seagrasses** that are there because there aren't any, and that it would, in fact, impact the **seagrasses** on the north side where there are **seagrasses**. Well, I'm persuaded that...there are conditions, and there are **hardships** that would allow me to, at some point, make a motion to approve both the dock and the proposed boat lift.

Am. App. 112:9 to 113:12. (Emphasis added). This passage includes the only time any of the Board members specifically mentioned “undue hardship” or “hardship.” Since the Variance Order does not provide a written analysis of the Section 138-231 elements, the above-quoted language is the only insight this Court has into what the Board premised its finding of unnecessary hardship on. We assume based on Mr. Doran’s above-quoted statements that the Board grounded its unnecessary hardship finding on: 1) water depth evidence; and 2) evidence concerning the potential effect of different design plans on seagrass populations.

At the May 5, 2021 hearing, County representatives presented their conclusions that a boat lift to the north of the dock would have sufficient water depth for boating activity and would be more beneficial to the aquatic vegetation on Respondent’s submerged lands. Respondent’s expert, Terri Skapik, disputed the County’s

seagrass study and separately opined that moving the boat lift to the north of the dock would be more harmful to the seagrass population than keeping the lift on the south side. Ms. Skapik also introduced data showing that the waters south of the dock were deeper and more navigable than the north side.

The water depth evidence presented by Respondent is insufficient to support the Board's conclusion that the unnecessary hardship element was met. Notably, Respondent did not argue that the water depth north of the dock was inadequate for boating activity. Instead, Respondent's counsel argued "the deeper the water, the better."⁵ However, the undisputed evidence before the Board indicated that: 1) water navigation regulations require a boat lift to have a minimum of 1.5 feet of water depth;⁶ and 2) the north side of the dock would afford at least 1.5 feet of water depth for a boat lift.⁷

⁵ See Am. App. 084:11. Later in the hearing, Board member John Doran echoed this phrase when he said: "I accept the premise that deeper is better for boaters." Am. App. 116: 2-3. Respondent's expert also argued "Trying to catch that extra depth makes all the sense in the world." Am. App. 088: 12-13.

⁶ The County's representative stated the following during the hearing: "Water navigation regulations requires [sic] a boat slip to have a minimum of 1.5 feet of water depth at mean low water." Am. App. 078: 15-17. Respondent's expert then testified: "every inch counts when you're talking one and a half feet of water depth which is the minimum depth to have a lift be permitted." Am. App. 088: 3-6. Thus, the evidence is not in dispute on this issue.

⁷ After apparently showing an image with the water depths at mean low water for both sides of the dock to the Board, the County's representative stated: "As you can see, there would be adequate water depth on that north side of the dock, if the lift was in that area." Am. App. 078:

The notion of “deeper is better” is not evidence of any practical difficulty which would result from building the boat lift to the north of the dock. Although Respondent may prefer for the lift to be in deeper waters, the evidence established that the north side of the proposed dock provides Respondent with enough water depth to obtain a boat lift permit. Evidence suggesting that Respondent cannot build a functional boat lift on the north side of the dock due to water depth is non-existent in the record. Under such circumstances, there is no competent substantial evidence of an unnecessary hardship on the basis of water depth.

As to the seagrass issue, the evidence produced to the Board is also insufficient to establish unnecessary hardship. Although Respondent’s expert opined that the best solution for the aquatic vegetation was for the new boat lift to be located south of the dock, Respondent’s representative did not provide any indication of how seagrass populations would make it difficult or limit Respondent’s ability to build a boat lift. For example, Respondent did not argue that an environmental regulation would make it more difficult to

17-19. Subsequently, Respondent’s expert stated: “So these are the water depths from the County. We did measure those same depths.” Am. App. 091: 5-6. Once again, the evidence is not in dispute on this issue.

obtain permits for a boat lift on the north of the dock due to the existing seagrass population. The evidence the Board relied upon merely suggests that a boat lift to the south of the dock is less harmful to the seagrass population. Such a proposition does not identify any sort of harm or hardship as to Respondent. Without any such showing, we also find that the seagrass evidence is not competent substantial evidence of unnecessary hardship.

Lastly, we also note that there is no evidence in the record suggesting that Respondent's new boat lift will be unlike those of other properties in the same zoning district if the boat lift is located on the north side of the dock. Notably, Respondent introduced specific data on dock length of other residential properties *in Respondent's neighborhood* when arguing in favor of the dock length variance that is not at issue in this action. On the contrary, Respondent did not introduce any similar evidence when arguing in favor of the boat lift variance. Respondent alleged at the May 5, 2021 hearing that the Board recently granted other dock-related variances due to water depth issues. However, no information on such variances was made part of the record and there is no indication that such variances concerned "properties in the same zoning district" or

neighborhood as Respondent's property. Thus, the record below also lacks competent substantial evidence on this component of the unnecessary hardship element.

Conclusion

The Board's Variance Order is not based on competent substantial evidence as to the unnecessary hardship element of LDC Section 138-231. Based upon the foregoing, the Second Amended Petition for Writ of Certiorari is **GRANTED**. The Variance Order issued by the Board on May 5, 2021 in the matter of VAR-21-15 is **QUASHED** as to the portion granting the boat lift variance.

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida, on this 2nd day of August, 2022.

Original Order entered on August 2, 2022 by Circuit Judges Amy M. Williams, Pamela A.M. Campbell, and Thomas Ramsberger.

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